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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

GLORIA MATUSOW, Plaintiff and Appellant, v. PRINCESS CRUISE LINES, LTD., et al., Defendants and Respondents.	B253893 (Los Angeles County Super. Ct. No. NC044427)

APPEAL from a judgment of the Superior Court of Los Angeles County, Teresa Beaudet, Judge. Affirmed.

Miriam Lebental and Howard D. Sacks for Plaintiff and Appellant.

Maltzman & Partners, Jeffrey B. Maltzman, and Teresa C. Senior for Defendant and Respondent Princess Cruise Lines, Ltd.

Appellant Gloria Matusow was injured when she slipped and fell while navigating a single step on a cruise ship owned and operated by respondent Princess Cruise Lines, Ltd. (Princess). Matusow sued Princess for negligence alleging that Princess had notice that the step constituted a dangerous condition and failed to take adequate measures to warn Matusow of the danger. The trial court granted summary judgment in favor of Princess and Matusow now appeals that ruling. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. Matusow Is Injured Aboard a Princess Cruise Ship

Matusow and her husband were passengers aboard a 10-day cruise on the *Sea Princess*, a commercial cruise ship owned and operated by Princess. The couple had standing dinner reservations at the same assigned table in the *Sea Princess's* Traviata Dining Room each evening of the cruise. The Traviata Dining Room included a single step, which Matusow and her husband had to ascend to arrive at their dining table and had to descend to leave the dining room. On the evening of May 28, 2011, the ninth day of the cruise, Matusow slipped and fell when she "missed" the single step as she was leaving the dining room. Matusow hit the marble floor and fractured her hip.

Prior to her fall, Matusow was aware of the presence of the single step. She and her husband had dined at the same assigned table in the Traviata Dining Room at least four prior times during their 10-day cruise. On each of those occasions, Matusow used the step to enter and exit the dining room without incident. Matusow had not observed any warnings signs on the wall near the step, but she had noticed a series of one to two inch white circles and a dark-colored strip on the top of the step. According to Matusow, on the day of her fall, she "was distracted" by the maître d' as she was approaching the step to leave and "didn't realize the step was that close when [she] was talking to him."

II. Matusow's Civil Complaint Against Princess

On April 2, 2012, Matusow filed this civil action against Princess alleging a single cause of action for negligence. The complaint specifically alleged that the "failure to delineate the step down and failure to place some optical cue to apprise one of the

difference in elevation from the one step going down constituted a dangerous condition," and that Princess "knew or should have known of the dangerous condition prior to [Matusow] sustaining the injuries stated herein." The complaint further alleged that Princess "had a duty to inspect, warn, and[/]or maintain the step," and that Princess "breached [its] duty of care in not inspecting, sufficiently warning, lighting, placing caution strips or tape and/or signs 'watch your step' and/or adding railings and[/]or other safety features to avoid a sudden and dangerous change in the floor level that was not clearly visible to passengers exiting the dining room."

III. Princess's Motion for Summary Judgment

On January 25, 2013, Princess brought a motion for summary judgment asserting it did not breach any duty of care owed to Matusow because the undisputed facts established that (1) Princess did not actively participate in the design or construction of the ship components that allegedly caused Matusow's injuries, (2) Princess did not have actual or constructive notice of any alleged dangerous condition, and (3) Princess owed no duty to warn Matusow of an alleged hazard that was visible and apparent to her prior to her fall. Princess argued that any one of these three grounds precluded a finding of liability for negligence. The motion was supported by Matusow's responses to requests for admission, excerpts from the depositions of Matusow and her husband, and two declarations from Dana Berger, Princess's Director of P&I Claims Litigation.

As set forth in Berger's supporting declarations, Princess purchased the *Sea Princess* from the Ficantieri shipyard in Italy. Princess "neither designed nor built the step nor the warning devices related to the step" where Matusow fell; rather, "[t]hese objects were designed and built by the Ficantieri shipyard." Between 2008 and 2010, the *Sea Princess* carried a total of 174,098 passengers and an average of 1,956 passengers on any given cruise. In the three-year period preceding Matusow's fall, there was only one other reported incident involving the single step in the Traviata Dining Room. That incident occurred on September 17, 2010, and involved a passenger tripping and falling as she ascended the step. In a written statement signed by the passenger, she advised

Princess that she did "not blame anyone" for the incident, and that she "should have been looking where [she] was going." In the three years preceding Matusow's fall, "no other passenger had ever reported that they fell or sustained any accident or injury due to any claimed defect or deficiency involving the step" at issue in this case. In that same three-year period, Princess also did not receive "any complaint or report of any danger, lack of warnings, or lack of lighting related to the step."

In her opposition, Matusow asserted that she had not alleged a cause of action against Princess for defective design or construction of the step. Rather, her negligence action was based solely on the theory that Princess knew or should have known that the step was a dangerous condition and that Princess breached its duty of care by failing to provide adequate warning features to prevent passengers from falling as they traversed the step. Matusow argued that Princess had actual notice that the step was dangerous because the warning measures in place at the time of her fall were inadequate and Princess admitted that another passenger had fallen on the step prior to Matusow. Matusow also argued that her prior knowledge of the presence of the step did not relieve Princess of its duty to warn her of a dangerous condition because Matusow had no basis for knowing the step was dangerous before she fell.

Matusow's opposition was supported by two declarations from Jay William Preston, a registered professional safety engineer and certified safety professional. In connection with the litigation, Preston reviewed photographs of the area surrounding the step where Matusow fell and conducted an onboard inspection of the step in April 2013. Preston offered the following observations and opinions about the step: (1) "there were no [Tivoli] type lights or other lights at the nose of the step at the time of the incident"; (2) "[t]here were no adequate markings (warnings) on the step to alert one that a step was there," but rather "a series of light colored dots at some distance from the step nose edge"; (3) "the granite at the top of the step is the same color and consistency of that on the lower level so that one is unable to determine where the step ends"; (4) "[w]here the granite ends there is a brightly colored patterned carpet that acts as a camouflage" so that "one is unable to see that there is a step at all"; (5) "[t]here were no handrails present

which would have put a visual and tactical cue into the sight line of a passenger"; and (6) "[t]here is a small, difficult to see and read placard . . . that said, 'watch your step,'" which was "situated on the wall above those walking down the step."

In his declarations, Preston opined that the safety measures in place at the time of Matusow's fall, including "the placing of an unremarkable, difficult to read, sign well above the step, under the lip of the adjacent counter and the placement of light colored dots on the upper tread of the step and a dark colored anti-skid strip at some distance from the step nose were inadequate, not within the industry standard and served no purpose to apprise one . . . that a single step existed." He further opined that "[t]he combination of lack of railings, inadequate warning, and improper position of the strips and circles on the step constituted a dangerous condition, and was the proximate cause of Ms. Matusow's missing the step and falling." Preston also stated that "[w]ere the step . . . presented with appropriate visual and tactile cues, Ms. Matusow's fall would not have occurred with the proximate and resultant injury."

IV. The Trial Court Grants Summary Judgment In Favor of Princess

On August 5, 2013, the trial court granted summary judgment in favor of Princess. In issuing its ruling, the court sustained four of Princess's evidentiary objections to Preston's supplemental declaration, and overruled all of Matusow's evidentiary objections to Berger's declarations. With respect to Princess's liability for a design or construction defect, the court concluded that Matusow failed to raise a triable issue of fact as to liability for negligence in designing or constructing the step because Matusow presented no admissible evidence that Princess "did anything to create the dangerous condition," and the undisputed evidence established that "the alleged dangerous condition was a result of the . . . original design features that existed at the time of the incident."[1] With respect to Princess's liability for failing to warn Matusow of a dangerous condition,

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[1] Although Matusow had stated in her opposition that she was not alleging a design or construction defect, the trial court noted the gravamen of her claim was that "the step was negligently designed and required additional features to make it safe."

the court concluded that Matusow failed to raise a triable issue as to whether Princess had notice that the step constituted an alleged dangerous condition because the one prior incident involving a passenger falling on the step was not sufficiently similar to the incident involving Matusow, and Matusow offered no other admissible evidence to show that Princess knew or should have known that the step was dangerous. The court also concluded that Princess had no duty to warn Matusow of the alleged dangerous condition because Matusow admitted she was aware of the presence of the step prior to her fall.

Matusow timely filed a notice of appeal from the judgment in favor of Princess.[2]

DISCUSSION

I. Standard Of Review

"[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted.) "Once the [movant] has met that burden, the burden shifts to the [other party] to show that a triable issue of one or more material facts exists as to that cause of action . . . ." (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.*, *supra*, at p. 850.) The party opposing summary judgment "may not rely upon the mere allegations or denials of its pleadings," but rather "shall set forth the specific facts showing that a triable issue of material fact exists . . . ." (Code Civ. Proc., § 437c, subd. (p)(2).) A triable issue of material fact exists where "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.*, *supra*, at p. 850.)

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[2] Because Matusow filed her notice of appeal on January 10, 2014, prior to the trial court's entry of a judgment in this matter, her appeal was deemed premature under California Rules of Court, Rule 8.104(d). On March 7, 2014, following an order to show cause issued by this court, Matusow filed a final judgment that was entered by the trial court.

Where summary judgment has been granted, we review the trial court's ruling de novo. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 860.) We consider all the evidence presented by the parties in connection with the motion (except that which was properly excluded) and all the uncontradicted inferences that the evidence reasonably supports. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) We affirm summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)

II. Matusow Failed to Challenge Evidentiary Rulings on Appeal

Before addressing whether the trial court properly granted summary judgment in favor of Princess, we must determine what portion of Matusow's proffered evidence may be considered on appeal. In reviewing an order granting or denying a motion for summary judgment, we generally "'consider[] all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.'" (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.) In addition, a party who fails to "attack the [trial court's evidentiary] rulings on appeal . . . forfeit[s] any contentions of error regarding them." (*Frittelli, Inc. v. 350 North Canon Drive* (2011) 202 Cal.App.4th 35, 41; see also *Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1014-1015 [party forfeits "any issues concerning the correctness of the trial court's evidentiary rulings" by failing to "challenge the trial court's ruling sustaining . . . objections to certain evidence offered in opposition to the summary judgment motion"].) Accordingly, where an appellant does not challenge a trial court's evidentiary rulings excluding certain evidence on a motion for summary judgment, "we exclude this evidence from our review of the summary judgment motion." (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1181.)

In this case, the trial court sustained four of Princess's evidentiary objections to a declaration submitted by Preston in support of Matusow's opposition to the summary judgment motion. Although Matusow relies on the excluded evidence in her opening brief, she does not affirmatively challenge the trial court's evidentiary rulings on appeal.

Instead, the only reference in the opening brief to those rulings is a footnote that states the trial court sustained one of Princess's objections to Preston's declaration, and that Matusow "contends this was prejudicial error." However, this conclusory assertion is not accompanied by any legal analysis explaining why the evidentiary rulings were incorrect. "'Appellate briefs must provide argument and legal authority for the positions taken. "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived."' [Citation.]" (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956; see also *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830 ["[t]he absence of cogent legal argument or citation to authority allows this court to treat the contentions as waived"].) Because Matusow has not set forth any legal basis for her assertion that the trial court's evidentiary rulings were erroneous, she has forfeited any challenge to those rulings, and we do not consider the evidence excluded by the trial court.

III. Overview of Maritime Negligence Law

"[T]he duty of care of the owner of an excursion ship is a matter of federal maritime law." (*DeRoche v. Commodore Cruise Line, Ltd.* (1994) 31 Cal.App.4th 802, 807 (*DeRoche*); see also *Nash v. Fifth Amendment* (1991) 228 Cal.App.3d 1106, 1112, fn. 5 [duties of shipowner "are defined with reference to federal admiralty law"].) Under federal maritime law, the duty of care owed by a shipowner to its passengers is that of "reasonable care under the circumstances." (*DeRoche, supra*, at p. 807; see also *Kermarec v. Compagnie Generale* (1959) 358 U.S. 625, 630 ["[i]t is a settled principle of maritime law that a shipowner owes the duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew"]; *Samuels v. Holland Am. Line-USA, Inc.* (9th Cir. 2011) 656 F.3d 948, 953 ["'[t]he owner of a ship in navigable waters owes to all who are on board . . . the duty of exercising reasonable care under the circumstances of each case'"].)

"[A] shipowner ordinarily has no duty to insure the health or safety of its passengers. [Citations.]" (*DeRoche, supra*, 31 Cal.App.4th at pp. 807-808.) Rather, it

"is required to use reasonable care to furnish such aid and assistance as an ordinarily prudent person would render under similar circumstances." (*Id*. at p. 808.) Where a shipowner "has a continuing obligation for the care of its passengers, 'its duty is to warn of dangers known to the carrier in places where the passenger is invited to, or may reasonably be expected to visit.'" (*Id*. at p. 809.) A shipowner "must have 'actual or constructive notice of the risk-creating condition' before it can be held liable" for a failure to warn of the alleged risk. (*Samuels v. Holland Am. Line-USA, Inc.*, *supra*, 656 F.3d at p. 953; see also *Keefe v. Bahama Cruise Line, Inc.* (11th Cir. 1989) 867 F.2d 1318, 1322 [duty of reasonable care "requires, as a prerequisite to imposing liability, that the carrier have had actual or constructive notice of the risk-creating condition"]; *Monteleone v. Bahama Cruise Line* (2d. Cir. 1988) 838 F.2d 63, 65 ["a shipowner is responsible for defective conditions aboard ship only when it has actual or constructive notice of them"].)

In addition, "there is no duty to warn of a danger that is as obvious to the injured party as to the defendant." (*DeRoche*, *supra*, 31 Cal.App.4th at p. 810.) Accordingly, while a shipowner "has a duty to warn the passengers of dangers, 'this obligation extends only to those dangers which are not apparent and obvious to the passenger.'" (*Isbell v. Carnival Corp.* (S.D. Fla. 2006) 462 F.Supp.2d 1232, 1237; see also *Smolnikar v. Royal Caribbean Cruises Ltd.* (S.D. Fla. 2011) 787 F.Supp.2d 1308, 1322-1323 [a shipowner's duty to warn "encompasses only '"those dangers which are not apparent and obvious to the passenger"'"].)

IV. The Trial Court Properly Granted Summary Judgment

On appeal, Matusow argues that the trial court erred in granting Princess's motion for summary judgment because there were triable issues of material fact as to Princess's liability for negligence. In particular, Matusow contends that the trial court's ruling was erroneous because it improperly converted her cause of action for failure to warn of a known dangerous condition into a cause of action for product liability. Matusow also claims that there were triable issues of fact as to whether the step from which she fell

constituted a dangerous condition and whether Princess had notice of the alleged dangerous condition and failed to provide adequate warnings.

A. The Trial Court's Ruling Addressed Two Theories of Negligence

Matusow asserts that, when the trial court granted summary judgment in favor of Princess, it did so solely on the ground that Princess was not liable as a matter of law for negligently designing or constructing the step from which she fell. Matusow argues that the trial court's ruling was erroneous because she never alleged a negligence claim based on a theory of product liability, but rather pleaded only a general negligence claim based on a theory of failure to warn of a known dangerous condition. Contrary to Matusow's contention, however, the trial court did not decide Princess's summary judgment motion based solely on a product liability theory of negligence. Rather, the trial court expressly recognized in its ruling that, even if Princess did not design or construct the step at issue, it could still be liable for negligence if it had notice that the step constituted a dangerous condition and failed to warn Matusow of a danger that was not obvious to her.

In ruling on the summary judgment motion, the trial court therefore addressed both theories of liability: (1) negligent design or construction, and (2) failure to warn of a known dangerous condition. With respect to the negligent design or construction theory, the trial court concluded that Matusow failed to raise a triable issue of material fact because the undisputed evidence showed that Princess neither designed nor constructed the single step where Matusow fell. With respect to the failure to warn theory, the trial court concluded that there were no triable issues of material fact because the evidence submitted by the parties established that Princess did not have notice that the step was in an allegedly dangerous condition and did not have a duty to warn Matusow of the presence of the step when she already knew that it was there.

Because Matusow is not claiming on appeal that Princess is liable for negligently designing or constructing the step at issue, we need not address whether the trial court correctly determined that Matusow failed to raise a triable issue of fact under this theory.

Rather, the relevant inquiry before us is whether the trial court properly granted summary judgment on the alleged failure to warn Matusow of a known dangerous condition.

B. Princess Did Not Have Notice of the Alleged Dangerous Condition

Matusow contends that the trial court erred in granting summary judgment in favor of Princess because there were triable issues of fact as to whether the step from which she fell constituted a dangerous condition and whether Princess had notice of the dangerous condition prior to her fall. She asserts that the step was a dangerous condition because the warning measures in place at the time of her fall, including the light-colored circles and anti-skid strip some distance from the edge of the step and the small, difficult-to-read "watch your step" sign on the nearby wall, were inadequate to alert passengers to the presence of the step. She also asserts that Princess had notice that the step was a dangerous condition because Princess either installed those warning measures itself, or knew or should have known that the pre-existing measures were inadequate and that additional warnings were needed to make the step safe. We conclude that, even assuming the step constituted a dangerous condition, the undisputed evidence demonstrated that Princess did not have notice of the dangerous condition prior to Matusow's fall.

First, contrary to Matusow's claim, Princess presented evidence establishing that it did not design or construct the allegedly inadequate warning measures that were in place at the time of Matusow's fall. In her original declaration filed in support of Princess's summary judgment motion, Dana Berger specifically stated that "Princess neither designed nor built the step *nor the warning devices related to the step* where [Matusow] allegedly fell," and that "[t]hese objects were designed and built by the Ficantieri shipyard." In her supplemental declaration, Berger added that "[w]hile Princess will have input into major design issues (size of the vessel, themes of various rooms, amenities to be offered onboard, etc.), Princess was not involved in minor design or construction details such as the design or construction of the single step in the dining room that is at issue in this litigation." In her opposition to the summary judgment motion, Matusow speculated that, because the "watch your step" sign, anti-skid strip, and light-colored

circles were removable, they were not part of the original design or construction of the ship and must have been added after-the-fact by Princess. However, Matusow offered no admissible evidence to challenge the showing that Princess had no involvement in designing or installing these warning devices.[3] Accordingly, the mere fact that there were warning measures in place prior to Matusow's fall does not raise a triable issue of fact as to whether Princess had notice that these measures were inadequate or that additional warnings were required to make the step safe.

Second, Princess produced evidence affirmatively showing that it did not have actual or constructive notice that the warning devices in place at the time of Matusow's fall were inadequate to alert passengers to the presence of the step. In particular, Princess offered evidence establishing that, in the three years preceding Matusow's fall, there had been only one reported incident involving a passenger falling on the step. In a written statement submitted to Princess, the passenger reported that she "tripped going up a step at the table" because she "was talking and didn't see the step." The passenger also stated that she did not blame any "conditions, people or equipment for the accident." When asked "what, if anything, could have been done to prevent the accident," the passenger responded that she "should have been looking where [she] was going." She did not identify any defect in the step, or deficiency in the warning devices for the step, that would have put Princess on notice that the step was dangerous. Princess also presented evidence showing that, in that same three-year period, "no other passenger had ever reported that they fell or sustained any accident or injury due to any claimed defect or deficiency involving the step," and that Princess "had not received any complaint or

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[3] The only evidence offered by Matusow was the declaration of Preston, who opined that these warning devices did not modify the structure of the ship and that Princess must have had notice that the step was dangerous because it installed these devices to alert its passengers to the presence of the step prior to Matusow's fall. However, the trial court sustained Princess's evidentiary objections to this portion of Preston's declaration, and for the reasons discussed above, we do not consider the excluded evidence in our review on appeal.

report of any danger, lack of warnings, or lack of lighting related to the step." In opposing the summary judgment motion, Matusow did not offer any contrary evidence to show that Princess either knew or should have known that the warning devices in place for the step were deficient.

On appeal, Matusow does not contend that the one other reported incident where a passenger fell on the step was similar to her own fall or was otherwise sufficient to put Princess on notice that the step was dangerous. Rather, Matusow claims that the mere absence of other prior similar incidents does not demonstrate, as a matter of law, that Princess lacked notice of the dangerous condition prior to her injury. However, under federal maritime law, a shipowner is entitled to summary judgment on a failure-to-warn claim where, as here, the shipowner presents undisputed evidence establishing that it did not have notice of any prior similar incidents involving the alleged dangerous condition and the plaintiff fails to offer any other admissible evidence showing the shipowner's actual or constructive notice of danger. (See, e.g., *Samuels v. Holland Am. Line-USA, Inc.*, *supra*, 656 F.3d at p. 954 [affirming summary judgment in favor of cruise line on claim for failure to warn of a dangerous swimming condition where cruise line presented evidence that it was not "aware of any similar accident, or any accident at all, that had previously occurred while a . . . passenger was swimming on the Pacific Ocean side of [the beach] and plaintiff "failed to provide any evidence to the contrary"]; *Smolnikar v. Royal Caribbean Cruises Ltd.*, *supra*, 787 F.Supp.2d at p. 1323 [cruise line entitled to summary judgment on failure-to-warn claim where "there were no accident reports . . ., or passenger comment forms or reviews, alerting [it] as to a potential safety concern" with a zip line tour, and thus, cruise line had no actual or constructive notice that tour was dangerous]; *Isbell v. Carnival Corp.*, *supra*, 462 F.Supp.2d at pp. 1237-1238 [cruise line entitled to summary judgment on negligence claim brought by passenger bitten by snake on shore excursion where cruise line was "not aware of any snake bites on this excursion during the history of its existence" and passenger offered no evidence of constructive

notice "other than the fact that her accident occurred"].)[4] In this case, the record reflects that, while Matusow provided the declaration of Preston to support her claim that the step at issue was a dangerous condition, she did not present any admissible evidence showing that Princess had actual or constructive notice of the dangerous condition prior to her fall.

Matusow nevertheless claims that Princess may have had constructive notice that the step was dangerous if it failed to inspect the area surrounding the step within a reasonable time before her injury. However, Matusow did not present any evidence demonstrating that Princess failed to conduct regular inspections or maintenance of the ship's premises, including the step at issue in this case. Although Preston opined in his declaration that the warning devices in place for the step were inadequate based on their original design and construction, he did not assert that any of these devices were worn, damaged, or poorly maintained by Princess. Matusow offered no other evidence to support an inference that, notwithstanding the lack of any prior similar incidents or reports related to the step, Princess knew or should have known that the ship's original warning features were insufficient to alert its passengers to the presence of the step. Because the undisputed evidence established that Princess did not have actual or constructive notice that the step was an alleged dangerous condition, the trial court properly granted summary judgment in favor of Princess on Matusow's negligence claim.

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[4] In support of her argument that a lack of prior similar incidents is not dispositive on the issue of notice, Matusow cites to cases involving non-maritime negligence claims. (See, e.g., *Neel v. Mannings, Inc.* (1942) 19 Cal.2d 647; *Ridley v. Grifall Trucking Co.* (1955) 136 Cal.App.2d 682; *Sander v. Los Angeles Ry. Corp.* (1918) 38 Cal.App. 222.) To the extent that they do not conflict with federal maritime law, Matusow's cited cases support the general principle that "[t]he mere fact that a particular kind of an accident has not happened before does not, under all circumstances, show that such accident is one which might not reasonably have been anticipated." (*Ridley v. Grifall Trucking Co.*, *supra*, at p. 686.) However, these cases do not suggest that a defendant may be liable for failure to warn of a dangerous condition in the absence of other evidence showing that the defendant had actual or constructive notice of the danger.

C. Princess Had No Duty to Warn of an Open and Obvious Condition

As a separate and alternative ground for affirming summary judgment in favor of Princess, we conclude that the trial court correctly determined that Princess did not have a duty to warn Matusow of the presence of the step because it was apparent and obvious to Matusow prior to her fall. At her deposition, Matusow admitted that she and her husband had dined at the same table in the Traviata Dining Room at least four prior times during their 10-day cruise, and that, on each of those occasions, she had no difficulty using the step to enter and exit the dining room. She also admitted that, prior to her fall, she had observed the white circles and the dark-colored strip on the top of the step. When asked specifically if she "knew that the step was there prior to [her] fall," Matusow responded, "Yes, absolutely." Based on such testimony, the danger posed by the presence of the step was open and obvious to Matusow, and thus, Princess had no duty to warn Matusow of the danger. (See *Cohen v. Carnival Corp.* (S.D. Fla. 2013) 945 F.Supp.2d 1351, 1358 [cruise line had no duty to warn plaintiff of "open and obvious" danger posed by descending stairs at end of ship's gangplank where plaintiff was familiar with the disembarkation process and had "previously exited that same ship down the gangplank without incident"]; *Luby v. Carnival Cruise Lines, Inc.* (S.D. Fla. 1986) 633 F.Supp. 40, 42 [cruise line had no duty to warn plaintiff of shower ledge where plaintiff previously had been a passenger on ship and presence of ledge "was, or should have been obvious to [plaintiff] by the ordinary use of her senses"].)

Matusow argues that the danger posed by the step was not obvious and apparent to her because there was evidence showing that she momentarily forgot that she had to traverse the step at the time of her fall. However, the record reflects that Matusow never testified that she was unaware of the existence of the step or the fact that she had to descend the step to exit the dining room. Rather, Matusow testified that, at the time of her fall, she "was distracted" by a conversation with the maître d' as she was approaching the step to leave, and that she "didn't realize the step was that close when [she] was talking to him." Princess therefore had no duty to warn Matusow of the presence of a

step that she admits knowing was there. Based on the undisputed evidence, the trial court did not err.

DISPOSITION

The judgment is affirmed. Princess shall recover its costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

STROBEL, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.